been misled by the other side or where some mistake has been made in the registry itself and he was misled by an officer of the court or where delay in filing notice has been caused by unforeseen circumstances like sudden death or inevitable accident or sudden serious illness or something of that kind which reasonably account for the delay. Under any of these circumstances, extension of time may be allowed. (*per* Farwell L.J. in *In Re Coles and Ravenshear, supra*). The mere fact of misunderstanding of the rules is not such a special circumstance as to induce the court to give leave to extend the time to file notice of appeal.

I had no alternative but to dismiss the application with costs. I ordered the sum of $150 deposited in court to be paid to the respondents to account for the costs.

The motion by Mr. Jayadeva in Civil Appeal No. 22/72 was struck out with costs.

Order accordingly.

Solicitors: *B. H. Oon; Jayadeva & Zahir.*

TAN FONG GUAN & ORS. v. MALAYAN BANKING BHD.

[F.C. (Suffian C.J., Gill and Ong Hock Sim F.JJ) November 20, 1973]

[Kuala Lumpur — Federal Court Civil Appeal No. 2 of 1973]

Land Laws — Charges of land to secure advances by bank up to limit of $35,000 and $30,000 respectively — Whether limit covers both principal and interest or whether it excludes interest.

In this case one Lim Meng See had executed two charges in favour of the respondent bank as security for all advances to be made by the bank to him up to the limit of $35,000 under the first charge and $30,000 under the second charge. Subsequently the land was subdivided and Lim Meng See transferred various lots in the land subject to the said charges to the appellants. Lim Meng See became bankrupt and at the date of the adjudication of bankruptcy the amount due to the bank in respect of the advances made was $73,173.79 with further interest at the rate of 9.6% per annum. The respondent bank claimed payment of the amount due. The appellants offered to pay the sum of $65,000 for discharge of the lands but this was not accepted and the respondents applied to the court for the land to be sold to satisfy the total amount due to them. In the High Court it was held that the limits of $35,000 and $30,000 were intended to apply to principal only and therefore judgment was given for the respondents. The appellants appealed.

Held (Suffian C.J. and Ong Hock Sim F.J., Gill F.J. dissenting) allowing the appeal: the words "up to the limit of $35,000" and "up to the limit of $30,000" in the charges clearly govern both principal and interest and therefore on repayment of the sum of $65,000 with interest the appellants were entitled to have the land discharged from liability under the charges.

Cases referred to:-

(1) *White* v. *City of London Brewery Company* (1889) 42 Ch. D. 237, 248.

(2) *Rengasamy Pillay* v. *Comptroller of Income Tax* [1970] 1 M.L.J. 233.

(3) *Inland Revenue Commissioner* v. *Oswald* [1945] A.C. 360, 379.

FEDERAL COURT.

Chung Shiu Tett for the appellants.

Chan Siew Yoon for the respondent.

Suffian C.J.: The facts and the arguments in this appeal have been well stated in the previous judgments* and there is no need for me to repeat them.

With respect I agree with my brother Ong that the limit applies both to principal and interest, not to principal only and that this appeal be allowed.

In my view the words "up to the limit of $35,000" in the recital of the first charge clearly govern both principal and interest. They would have governed only principal (not interest) if the recital had read:

"I, Lim Meng See... desiring to render the said land available for the purpose of securing to and for the benefit of Malayan Banking Ltd.... the repayment on demand of all sums advanced to me bv the Bank in manner hereinafter appearing up to the limit of $35,000 (with interest thereon)".

In my view the words "up to the limit of $35,000" in the operative part of that charge also govern both principal and interest, not principal only. They would have governed only principal (not interest) if the operative part had read:

"I do hereby charge the said land for the benefit of the bank with the repayment on demand of the balance which on the account between me and the Bank shall for the time being be owing, etc., for principal up to the limit of $35,000 and for interest, etc., commission and other usual banker's charges".

In the event there shall be an order as follows:

1. This appeal is allowed with costs here and in the court below.
2. The learned trial judge's order is hereby set aside and instead there shall be an order as proposed by my brother Ong.

Appellants' deposit to be returned to them.

Gill F.J.: On 2nd May 1962 one Lim Meng See executed a charge over his land held under Grant for Land No. 7072 for Lot 1599 in the Mukim of Labis in the District of Segamat, Johore in favour of the respondents, the Malayan Banking Berhad, as security for the repayment of all sums advanced to him by the respondents up to the limit of $35,000 bearing interest at 12 per cent per annum with monthly rests. On 11th June 1963 he executed a second charge over the same land as security for the repayment of all sums advanced to him by the respondents up to the limit of $30,000 bearing interest thereon at 9.6 per cent per annum with monthly rests.

The two charges, which were duly registered, were in identical terms except for the difference in the amount to be advanced on each charge and the rate of interest. The relevant parts of the recital and the operative clause of the first charge are as follows:

"I Lim Meng See... desiring to render the said land available for the purpose of securing to and for the benefit of Malayan Banking Limited... the repayment on demand of all sums advanced to me by the bank in manner hereinafter appearing (with interest thereon at the rate of 12 per cent per annum) up to the limit of Dollars Thirty five thousand only ($35,000/-).

DO HEREBY CHARGE the said land for the benefit of the bank with the repayment on demand of the balance which on the account between me and the bank shall for the time being be owing in respect of cheques, bills, notes or drafts drawn, accepted or endorsed by me either alone or jointly with another or others... up to the limit of Dollars Thirty five thousand only ($35,000/-) for principal and for interest at the rate of 12 per cent per annum with monthly rests, commission and other usual bankers' charges,...."

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* Judgments of Gill and Ong Hock Sim F.JJ. below. — Ed. M.L.J.

On or about 1st December 1963 the land in question was sub-divided and separate titles were issued in respect of each of the sub-divided lots. On or about 6th December 1963 Lim Meng See transferred, subject to the two charges, all but one of the subdivided lots either in whole or in part to the three appellants, so that by the terms of the two charges the appellants together with Lim Meng See became liable to repay on demand the balance sum which on the overdraft account of Lim Meng See became due and owing to the respondents.

Lim Meng See was adjudicated bankrupt on 13th March 1965 when his overdraft account with the bank showed a balance of $73,173.79 with further interest at the agreed rates.

By letters dated 8th June 1971 the respondents through their solicitors demanded of Lim Meng See and the appellants payment within seven days of the sum of $116,826.53 being the outstanding balance as on May 15th 1971 on the overdraft account of Lim Meng See with the bank inclusive of interest. Lim Meng See as well as the appellants failed or neglected to pay the aforesaid sum of $116,826.53 together with the interest accruing thereon, thereby committing a breach of the terms and conditions of the two charges. This breach having continued for more than one month, the bank through their solicitors caused to be served on the chargors on 28th August 1971 a statutory notice of demand in Form 16D as prescribed under section 254 of the National Land Code. The chargors failed or neglected to comply with this notice.

On 19th January 1972 the respondents took out an originating summons in the High Court at Kuala Lumpur for an order under section 256 of the National Land Code that the lands, the subject matter of the two charges, be sold by public auction to satisfy the sum of $116,826.53 alleged to be due to the applicants as on 15th May 1971 together with further interest thereon to date of payment or realisation.

In due course, the originating summons came up for hearing before Mohamed Azmi J. The first respondent or the Official Assignee on his behalf had taken no steps to oppose the application for sale. The appellants objected to the application principally on the ground that the lands had been charged to the respondents for the purpose of securing only the principal amounts advanced by the respondents to Lim Meng See up to the limit of $65,000 so that the amount due in excess of that sum of $65,000 was not a secured debt which could be recovered by foreclosure proceedings under section 256 of the National Land Code.

It is common ground that the appellants have been willing since October 1967 to pay the said sum of $65,000, but the respondents refused to accept the offer contending that the two charges were meant to secure not only the repayment of the principal sums advanced up to the limit of $65,000 but also the payment of interest on those principal sums at the agreed rates.

As stated by the learned judge in his grounds of judgment, the determination of the dispute before him called for an interpretation of the two charges in respect of which the order for sale was applied. As both charges were in identical terms except for the amount and the rate of interest, he considered the terms of the first charge for the determination of the case before him.

In interpreting the relevant provisions of the charge the learned judge relied on the following passage in *Halsbury's* Laws of England, Volume 11, Third Edition paragraph 632:

> "The words of a written instrument must in general be taken in their ordinary sense notwithstanding the fact that such a construction may appear not to carry out the view which it may be supposed the parties intended to carry out; but if the provisions and expressions are contradictory, and there are grounds, appearing on the face of the instrument, affording proof of the real intention of the parties, that intention will prevail against the obvious and ordinary meaning of the words; where the literal construction would lead to an absurd result, and the words used are capable of being interpreted so as to avoid this result, the literal construction will be abandoned. So too, considerations of inconvenience may be admitted when the construction of the document is ambiguous. If, however, the intention is clearly and unequivocally expressed, then, however capricious it may be, the court is bound by it, unless it is plainly controlled by other parts of the instrument.
>
> The rule is that in construing all written instruments the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther. The instrument must be construed according to its literal import, unless there is something in the subject or context which shows that this cannot be the meaning of the words."

Applying the above rule to the facts of the present case the learned judge reached a conclusion which is set out in his grounds of judgment in the following terms:

> "In the present case, giving the words in the recital and the operative part of the instruments their ordinary sense, it is clearly the intention of the parties that the limit of $35,000 is intended to apply only to principal. In my view, the word *'and'*, which I have underlined in the operative part of the document, should be read disjunctively, so that interest should be treated as a distinct subject-matter. If the words 'interest at the rate of 12 per cent per annum with monthly rests, commission and other usual bankers' charges' were intended to come within the ambit of the limitation, then these words should have appeared before the words 'up to limit of Dollars Thirty five thousand only'. It is my considered opinion that this interpretation is supported by the fact that the words 'with interest thereon at the rate of 12 per cent per annum' are placed within brackets in the recital. The fact that these words are put within brackets is very significant, because if it is intended that interest should be included within the limitation clause there seems to be no necessity for putting those words within brackets. In any event, the words which appear in the operative part of the instrument should carry more weight than those appearing in the recital."

He further relied on a passage from a judgment of Cotton L.J. in the case of *White* v. *City of London Brewery Company*[1] which was cited to him by counsel for the applicants. That passage as set out in his grounds of judgment reads as follows:

> "In my opinion the proviso limiting the amount to be recovered does not apply to the moneys which the mortgagees can claim for their reimbursement, but simply to the principal moneys due on the mortgage, which are to be paid out of the sale moneys after the sums directed to be reimbursed have been paid, and does not prevent payment beyond the £900 either for interest or in respect of anything which is directed to be reimbursed."

In the result, the learned judge held that the limits of $35,000 and $30,000 under the two charges were only applicable to the principal sums and that the applicants were entitled also to recover the amount due in excess of that sum in respect of interest, commissions, bankers' charges, etc., by foreclosure proceedings under section 256 of the National Land Code. Accordingly, he made an order for the sale of the lands to satisfy the sum of $128,934.49, being the amount due to the applicants as on 18th December 1972, and further interest on the decretal sum at the rate of 6 per cent per annum from 19th December 1972 to the date of payment or realisation. It is from that decision of the learned judge that an appeal has been brought to this court.

The main ground of appeal against the learned judge's decision is that he erred in law in his interpretation that the words "up to the limit of Dollars Thirty Five Thousand Only ($35,000)" appearing in both the recital and the substantive part of the charge applied only to the principal sum. In support of that main ground is the second ground that the learned trial judge erred in holding that because the words "with interest thereon at the rate of 12% per annum" are placed within brackets in the recital to the charge, the intention was that interest was not to be included within the limitation. Also in support of the same ground is the third ground that the learned trial judge further erred in holding that the word "and" in the phrase "for principal and for interest at the rate of 12% per annum with monthly rests . . . " should be read disjunctively, so that interest should be treated as a distinct subject-matter.

It would seem clear that the answer to this appeal turns purely on the construction of the two charges which are identical except for the amounts and the rates of interest. It is contended for the appellants that the learned judge went wrong in placing an emphasis on the brackets. The words within the brackets are clearly used by way of parenthesis. The word "parenthesis" is defined in the Shorter Oxford English Dictionary to mean "an explanatory or qualifying word, clause, or sentence inserted into a passage with which it has not necessarily any grammatical connexion, and usually marked off from it by round or square brackets, dashes, or commas.". It is submitted that the fact that the words are in brackets has no significance. With that submission I entirely agree but only to the extent that those words are not grammatically essential to the passage into which they have been inserted, and especially when they appear only in the recital to the charge. Now, a recital is a part of a document stating facts. The facts stated in the recital to the first charge are that the chargor is desirous of making available his land as security for obtaining from the chargee advances up to $35,000 and that such advances are to bear interest at the rate of 12 per cent per annum. It is to be observed that the words "with interest thereon at the rate of 12 per cent per annum" within the brackets are explantory or qualifying words and that they do not necessarily have any grammatical connection with the passage into which they are inserted.

What governs the charge is its operative part. The operative part of the charge, to my mind, makes it quite clear that the land in question *stands charged with the repayment on demand of* the outstanding balance at any particular time of the chargor's account with the bank *up to the limit of $35,000 for principal and for interest at the specified rate* with monthly rests, commission and other usual bankers' charges. It is to be observed that the words "up to the limit of" qualify only the *amounts advanced* whether in respect of cheques, bills, notes or drafts drawn, accepted or endorsed by the chargor. The amounts which became due and payable from time to time on account of interest, commission, or other usual bankers' charges cannot be said to be the amounts *advanced* by the bank. Even the recital speaks of the repayment on demand "of all sums advanced to me". If the words within the brackets are not grammatically essential for the passage into which they have been inserted in parenthesis, the words "up to the limit of" in the recital itself would appear to relate only to the sums advanced to the chargor.

Assuming that I am wrong in thus construing the recital, there is a clear inconsistency between the recital and the operative part. The question therefore is, how is one to interpret the charge as a whole in the face of that inconsistency? In my judgment, the answer is that the operative part of the charge must prevail over the recital. I do not think any authority is required for the proposition that it is the operative part which must govern the terms and conditions of the charge when there is nothing ambiguous about it. If there is any ambiguity at all, it is in the recital. I am therefore of the opinion that the learned trial judge was quite right when he said that the words which appear in the operative part of the instrument should carry more weight than those appearing in the recital.

As regards the appellants' contention that the learned judge was wrong in holding that the word "and" in the operative clause of each of the charges should be read disjunctively, I do not think it makes any difference whether the word "and" is said to have been used disjunctively or conjunctively. The question is, what is the effect of the use of that word? The learned trial judge has answered that question himself by adding at the end of the sentence complained of the words "so that interest should be treated as a distinct subject-matter". He then goes on to elaborate that if the words "interest at the rate of 12 per cent per annum with monthly rests, commission and other usual bankers' charges" were intended to come within the ambit of the limitation, then those words should have appeared before the words "up to limit of Dollars Thirty five thousand only".

Another point taken on behalf of the appellants is that the learned judge failed to appreciate that there is no specific sum stated in the charge, so that the limit of Dollars Thirty five thousand should be treated as being inclusive of the principal sum, interest, commission and other usual bankers' charges. I do not think there is any merit in this point. The charge clearly was not in respect of a loan for a fixed sum but for overdraft facilities to the extent of $35,000, and it was in the statutory form. The fact that no specific principal sum is mentioned in the charge in the sense of a fixed loan does not by itself mean that

the extent of the limit must necessarily include both the principal sums advanced and interest, etc.

A further ground of appeal is that the learned trial judge failed to appreciate that the interest stated in the charge is 12 per cent per annum with monthly rests, that is, with compound interest, and that when such interest is added as a debit item in the account it loses its quality as interest and becomes capitalised by being merged with the principal. This is a point of law which was not raised in the court below and consequently was not dealt with by the learned trial judge. Counsel for the respondents, relying on the authority of what was stated by the Privy Council in the case of *Rengasamy Pillay* v. *Comptroller of Income Tax*,[2] submitted that the appellants were not entitled to raise it. The rule is that in order to raise this new point, the appellants must satisfy the court that there are exceptional circumstances and that all the facts which may be relevant to the new point are before the court and beyond dispute. There may be no special circumstances to justify the raising of this new point, but the facts relevant to it are before the court and they are not in dispute. The charge itself speaks of interests with monthly rests. I am therefore of the opinion that the preliminary objection to this ground must be overruled, especially when I consider this ground also to be without any merit.

As stated by Lord Porter in *Inland Revenue Commissioner* v. *Oswald*,[3] "capitalisation means no more than that interest, which continue to be interest, shall be treated together with the capital sum due as itself interest-bearing but does not alter its quality as interest". There is no suggestion whatsoever in this case that it is not possible to separate the amounts advanced under the charges and the amounts which have become due by way of interest, commission, and other usual bankers' charges. It is submitted on behalf of the appellants that in the case of an overdraft you do not separate principal and interest, because interest is capitalised all the time, so that there is only one sum owing. I do not think this submission can in any way alter the answer to this appeal. Of course, there is only one sum owing but there is no difficulty about separating the amount due on the principal sums advanced from what has become due by way of interest, etc.

The last ground of appeal is that the learned judge erred in following the opinion of Cotton L.J. given in his judgment in *White* v. *City of London Brewery Company*[1] when the facts in that case are quite different from those of the present case. It is true that the facts in that case were somewhat different from the facts here, but the learned trial judge was aware of that difference. He cited with approval the opinion of Cotton L.J. because of the obvious similarity in the principle involved in the two cases. I do not think, therefore, that the learned judge was wrong in following the opinion of Cotton L.J. Even if he was wrong in doing so, he was right in the construction which he put on the charge documents.

For the reasons which I have stated I would dismiss this appeal with costs.

Ong Hock Sim F.J.: The appellants and one Lim Meng See (who did not enter appearance) were respondents in an Originating Summons issued at the instance of the Malayan Banking Berhad for an order of sale by public auction under section 256 of the National Land Code of the land held under Grant No. 7072 for Lot No. 1599 in the Mukim of Labis in the District of Segamat, State of Johore. The said Lim Meng See had executed two charges in accordance with the Johore Land Enactment on May 4, 1962 and June 11, 1963 duly registered on August 13, 1962 and June 19, 1963 vide Presentation No. 167749 Volume CVI Folio 66 and Presentation No. 176652 Volume CIX Folio 142 respectively in favour of the bank as security for all advances to be made by the bank to the said Lim Meng See up to the limit of $35,000 under the first charge and $30,000 under the second charge, making a total of $65,000.

On or about December 1, 1963, the said land was subdivided and Certificates of Title were issued in respect of the subdivided lots, namely, 12332, 12333, 12334, 12335, 12336, 12337, 12338, 12339, 12340, 12341 and 12342 for Lots Nos. 4031, 4032, 4033 4034, 4035, 4036, 4037, 4038, 4039, 4040 and 4041 respectively.

On or about December 6, 1963, the said Lim Meng See transferred, subject to the first and second charges, the subdivided lots under the following Certificates of Title to: †

It is not disputed that both the subdivision and subsequent transfers of the sub-divided lots by the said Lim Meng See were with the approval and consent of the bank. It may also be inferred that upon the execution of the second charge in 1963, the interest of 12% per annum under the first charge was reduced to 9.6% per annum, the amount of interest agreed under the second charge.

†

Name	*Certificate of Title No.*	*Lot No.*	*Extent of Interest*
Tan Fong Guan (first appellant)	12333	4032	Undivided ½ share
— do —	12334	4033	— do —
Tan Ay Lin (f) and Lim Tan Tee (f) (second and third appellants)	12335	4034	The whole
— do —	12336	4035	— do —
Lim Tan Tee (f)	12337	4036	Undivided ½ share
— do —	12338	4037	— do —
Tan Fong Guan and Tan Ay Lin	12339	4038	The whole
— do —	12340	4039	— do —
Lim Tan Tee	12341	4040	Undivided ½ share
— do —	12342	4041	— do —

On March 13, 1965, the said Lim Meng See was adjudicated a bankrupt. On that date, the amount due to the bank in respect of advances made was $73,173.79 with further interest thereon at the rate of 9.6% per annum.

Before commencement of the proceedings which resulted in this appeal before us, the bank had instituted Originating Summons No. 190 of 1968 in the High Court at Muar (which was withdrawn) and Originating Summons No. 284 of 1969 in the High Court at Muar (which was dismissed on the ground that the notices of demand were bad in law).

The appellants say that upon receipt of notices of demand dated October 20, 1967, they had through their solicitors on November 17, 1967 offered to pay the sum of $65,000 for discharge of the lands which, as advised, they contend represent the limit of the security of the bank upon the charged land. Any sum in excess thereof due from Lim Meng See would be an unsecured debt provable in bankruptcy. They maintained that view throughout but the respondent/Bank claimed that the said land was charged with the repayment of the $65,000 being the limit of the principal, and the interest thereon at the agreed rate. As the learned judge puts it "the issue to be determined is whether, having regard to the terms of the charge, the limit figure of $35,000 covers both principal and interest or whether it excludes interest," it being agreed that for purposes of the case, the construction of the first charge alone be considered. The recital stated that the chargor "being registered as the proprietor" is desirous "to render the said land available for the purpose of securing ... the repayment on demand of all sums advanced ... by the bank in manner hereinafter appearing (with interest thereon at the rate of 12 per cent per annum) up to the limit of Dollars Thirty-five thousand only ($35,000)". The operative part went on to say "DO HEREBY CHARGE the said land ... with the repayment on demand of the balance which on the account ... shall be owing in respect of cheques, bills, notes or drafts ... including all moneys ... up to the limit of Dollars Thirty-five thousand only ($35,000) for principal and for interest at the rate of 12 per cent per annum with monthly rests, commission and other usual bankers' charges, *such sum* to be raised and paid ... immediately upon the receipt ... of a notice in writing." The learned judge "giving the words in the recital and the operative part of the instrument their ordinary sense" concluded that "it is clearly the intention of the parties that the limit of $35,000 is intended to apply only to principal." He further held the conjunction *"and"* in the operative part should be read disjunctively so that interest should be treated as a distinct subject-matter.

I am unable however to find need in the present case to have recourse to any canons of construction. The recital referred to "all sums advanced *in manner hereinafter appearing*", which as stated in the operative part, shall "be owing in respect of cheques, bills, notes or drafts drawn, accepted or endorsed ... either alone or jointly with another or others, including all moneys which may become owing in respect of any notes, bills or drafts drawn, accepted or endorsed ... solely or jointly with another or others which may not at the time of closing the said account have become due or payable but which for the time being have been entered in the said account or in respect of cheques, bills, notes or drafts accepted, paid or discounted ... either alone or jointly with another or others or for loans or advances made to or for the use and accommodation of me whether alone or jointly with another or others or in respect of contracts for the forward delivery of goods, bills or specie otherwise howsoever". It is equally clear that the land is security for repayment of all such sums advanced (with interest *thereon* at the rate of 12 per cent per annum) up to the limit of $35,000. The "and" in the operative part cannot in my view be read disjunctively. The balance on account between the chargor and the bank was up to the limit of Dollars Thirty-five thousand only ($35,000) for principal *and* for interest at the rate of 12 per cent per annum with monthly rests, commission and other usual bankers' charges, *such sum* to be raised and ... immediately upon the receipt ... of a notice in writing sent by the bank". If interest were to be a separate item, it would have been simple to have said "up to the limit of $35,000 only for principal and for interest *thereon* at the rate of 12% per annum" or "up to the limit of $35,000 only for principal *with interest thereon* at the rate of 12% per annum".

In my view, the said land is charged "with the repayment on demand of the balance which on the account between me and the bank shall for the time being be owing" ... up to the limit of $65,000 with interest at 9.6% per annum. In terms of the charge, the chargor covenants after service of notice of demand to "pay interest *thereon* at the aforesaid rate of 9.6% per annum on the balance owing to the bank."

As was said by Lord Esher M.R. in *White* v. *City of London Brewery Company*: [1]

> "First of all, as I say, the nominal plaintiff had borrowed £700 upon a security that was to cover that sum and further advances, subject to a proviso which really came to this, that if they lent him more than £900 they should not be able to rely on the mortgage *as a security for the excess.*"

It would seem therefore that the respondents are not entitled to rely on the two charges as security on the balance owing beyond the limit of $65,000, with interest at the aforesaid rate of 9.6% per annum after service of a notice of demand in writing. In so far as the sum owed exceeds the limit of $65,000 as at the date of demand, that excess will be a debt personal to the chargor (the first respondent) and provable as a debt in bankruptcy. Appellants' counsel conceded that the appellants were liable to pay interest from the date of demand, that is, June 10, 1971 to date of payment (vide paragraph 10 of the affidavit of Chew Teck Hong affirmed on January 13, 1972 and in terms of the charge).

I agree and I would therefore allow the appeal with costs here and in the court below and set aside the order for sale by public auction of the said land. There will be a further order for repayment of the sum of $65,000 with interest at 9.6% per annum with effect from June 10, 1971 to December 18, 1972 and thereafter on such sum with interest at 6% till satisfaction. Upon receipt of payment of such sum, the bank shall,

at the appellants' costs, discharge the said land from liability under the said two charges.

Appeal allowed.

Solicitors: *Chung & Huang; Shook Lin & Bok.*

CHONG CHONG WAH & ANOR. v. SIVASUBRAMANIAN

[F.C. (Suffian C.J., Gill and Ong Hock Sim F.JJ.)
November 20, 1973]
[Kuala Lumpur — Federal Court Civil Appeal No. 7 of 1973]

Control of Publications — Seizure of article suspected to contain prohibited or prejudicial publication — Impounding of prejudicial publication — Whether court has jurisdiction to entertain suit — Whether impounding unlawful — Control of Imported Publications Act, 1958 (Act 63), ss. 9(1) and 18(1).

This was an appeal against the judgment of the High Court ([1973] 1 M.L.J. 157), wherein it was held that the impounding of a book belonging to the respondent by the police was unlawful. The appellants appealed and it was argued *inter alia* (1) that the learned trial judge had no jurisdiction to entertain the suit because of the clear and unambiguous words of section 18 of the Control of Imported Publications Ordinance, 1958; (2) that the learned trial judge was wrong in holding that the impounding by the police was wrongful.

Held, dismissing the appeal: (1) as it was not shown that the book had been seized or impounded under the Ordinance within the meaning of section 18 of the Control of Imported Publications Ordinance, 1958, the court had jurisdiction to determine the validity or propriety of its seizure and impounding;

(2) on the evidence the learned trial judge was right in holding that the impounding of the book was wrongful.

The following authorities were cited in argument: *Mohamed Ashraff & Anor.* v. *Commissioner of Federal Capital* [1972] 2 M.L.J. 69; *Smith* v. *East Elloe Rural District Council* [1956] A.C. 736; *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147; *R.* v. *Statutory Visitors to St. Lawrence Hospital, Caterham* [1953] 2 All E.R. 766; *Commissioners of Custom & Excise* v. *Cure & Deeley Ltd.* [1962] 1 Q.B. 340; *Re Otago Clerical Workers' Award* [1937] N.Z.L.R. 578; *Hami Paihana* v. *Tokerau Dist. Maori Land Board & Ors.* [1955] N.Z.L.R. 314; *C.S. Rowjee & Ors.* v. *State of Andhra Pradesh & Ors.* A.I.R. 1964 S.C. 962; *Simms Motor Units Ltd.* v. *Minister of Labour etc.* [1946] 2 All E.R. 201.

FEDERAL COURT.

Abdul Razak bin Datuk Abu Samah (Senior Federal Counsel) for the appellant.

Lim Kean Chye for the respondent.

Suffian C.J.: The plaintiff was arrested and detained under the Internal Security Act. After his arrest the first defendant, Acting A.S.P. Chong Chong Wah, on 21st January, 1970, acting he said under the authority of the Act went to the plaintiff's house at Union Gardens, Kuantan, to search for documents. He found some books which he took away to check with Police headquarters. Subsequently he returned all of them except one entitled "Lenin" by David Shub.

There then followed some correspondence between the plaintiff and the Government — I shall return to this later on — and on 8th December, 1970, the plaintiff sued the first defendant and the second defendant his employers, the Malaysian Government, for —

(a) a declaration that the seizure of the book was wrongful;

(b) for the return of the book;

(c) for damages for detention of the book and for costs and further or other relief.

The learned judge declined to make the declaration sought; held that the book had been impounded by the first defendant; that such impounding was unlawful; and, as the book had been destroyed when the Special Branch building in Kuantan caught fire on 25th February, 1971, ordered the defendants to pay the plaintiff $3.60 (the cost of the book) and costs on the lower scale.

The learned judge did not award the plaintiff any damages as the claim for this was withdrawn by his counsel in his closing address.

The defendants appeal to this court.

There were originally five grounds of appeal, but three of them were abandoned, and thus there remain only two grounds.

It is argued, first, that the learned trial judge had no jurisdiction to entertain this suit because, it is said, of the clear and unambiguous words of section 18 of the Control of Imported Publications Ordinance, 1958; and, secondly, that he was wrong in holding that the impounding by the first defendant was wrongful.

Thus there are two issues in this appeal.

First, does the court have jurisdiction to entertain this suit in view of section 18 of the Ordinance? Second, was the impounding of the book in question wrongful?

It is necessary now to set out the words of sections 9 and 18 of that Ordinance. They read as follows:

"9. (1) Any authorised officer may seize, detain, open and examine any article which he suspects to contain any prohibited or prejudicial publication or any extract therefrom; and during such examination he may detain any person importing, distributing or posting such article, or in whose possession such article is found.

(2) If after such article has been opened and examined it is found —

(a) to contain or to consist of any prohibited publication or any extract therefrom, such article may be impounded and detained by an authorised officer for so long a period as he deems necessary and the person importing, distributing or posting it, or in whose possession it is found, may forthwith be arrested by such officer and proceeded against for the commission of an offence against section 8 or 10, as the case may be;

(b) in the opinion of an authorised officer to contain or to consist of any prejudicial publication or any extract therefrom, such article may with the approval of a Controller, be impounded by an authorised officer and withheld from delivery or return; and such officer may, with the approval of the Controller —

(i) destroy or cause to be destroyed such article or such contents thereof consisting of any such publication; and

(ii) deliver or cause to be delivered any such article or contents thereof which does or do not in the opinion of the Controller consist of such publication to the person to whom it would have been delivered if it had not been detained under this section, or in whose possession it was at the time of its seizure:

Provided always that instead of destroying or causing any such article to be destroyed the Controller may permit its return to the sender thereof.

(3) The provisions of this section shall not apply to any packing or article sent from any country outside Malaya and